SUPREME COURT OF THE UNITED STATES

No. 87-107

BRENDA PATTERSON, PETITIONER *v.*
McLEAN CREDIT UNION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[April 25, 1988]

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

While I join JUSTICE BLACKMUN's dissenting opinion, I write separately to emphasize those aspects of the Court's action today that I believe render the order particularly ill-advised.

The Court's spontaneous decision to reexamine our holding in *Runyon* v. *McCrary*, 427 U. S. 160 (1976), is certain to engender widespread concern in those segments of our population that must rely on a federal rule of law as a protection against invidious private discrimination. Although the present case involves a claim of discrimination in the workplace, an area of the law where there is substantial overlap between 42 U. S. C. § 1981 and Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U. S. C. § 2000e *et seq.*, a reexamination of the issue of statutory construction decided in *Runyon* implicates a much broader sphere of conduct. *Runyon* itself did not involve a claim of employment discrimination, but the question "whether . . . 42 U. S. C. § 1981, prohibits private schools from excluding qualified children solely because they are Negroes." 427 U. S., at 163. The Court's order today will, by itself, have a deleterious effect on the faith reposed by racial minorities in the continuing stability of a rule of law that guarantees them the "same right" as "white

citizens."* To recognize an equality right—a right that 12 years ago we thought "well established"—and then to declare unceremoniously that perhaps we were wrong and had better reconsider our prior judgment, is to replace what is ideally a sense of guaranteed right with the uneasiness of unsecured privilege. Time alone will tell whether the erosion in faith is unnecessarily precipitous, but in the meantime, some of the harm that will flow from today's order may never be completely undone.

In addition to the impact of today's decision on the faith of victims of racial discrimination in a stable construction of the civil rights laws, the order must also have a detrimental and enduring impact on the public's perception of the Court as an impartial adjudicator of cases and controversies brought to us for decision by lawyers representing adverse interests in contested litigation. The parties have asked us to decide whether § 1981 encompasses "a claim for racial discrimination in the terms and conditions of employment, including a claim that petitioner was harrassed because of her race." Pet. for Cert. i. Neither the parties nor the Solicitor General have argued that *Runyon* should be reconsidered.

As I have said before, "the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review." *New Jersey v. T. L. O.*, 468 U. S. 1214, 1216 (1984) (dissenting from order directing reargument). If the Court decides to cast itself adrift from the constraints imposed by the adversary process and to fashion its own agenda, the consequences for the Nation—and for the future

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*Section 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

of this Court as an institution—will be even more serious than any temporary encouragement of previously rejected forms of racial discrimination. The Court has inflicted a serious—and unwise—wound upon itself today.